



REPUBLIC OF KENYA



KENYA LAW
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Munga & another v Bulkon Builders Limited & 3 others (Environment and Land Case 188 of 2018) [2025] KEELC 5787 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5787 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 188 OF 2018**

**YM ANGIMA, J
JULY 31, 2025**

BETWEEN

OMAR MUGALA MUNGA 1ST PLAINTIFF

IDD NGALA 2ND PLAINTIFF

AND

BULKON BUILDERS LIMITED 1ST DEFENDANT

OCS BAMBURI POLICE STATION 2ND DEFENDANT

DEPUTY COUNTY COMMISSIONER KISAUNI 3RD DEFENDANT

OCPD KISAUNI 4TH DEFENDANT

RULING

A. Plaintiffs' application

1. By a notice of motion dated 03.05.2025 filed pursuant to Order 12 Rule 7 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the [Civil Procedure Act](#) (Cap 21), Article 159 of [the Constitution](#) and all other enabling provisions of the law, the plaintiffs sought, inter alia, a review or setting aside of the dismissal order made on 02.05.2024 and reinstatement of the suit for hearing.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Omar Mugala Munga on 06.05.2025. It was contended that the plaintiffs' failure to attend court on 02.05.2024 was not deliberate. It was stated that the failure of the advocate to attend court was due to inadvertence or a genuine and excusable reason. It was further contended that their previous advocate on record did not inform them of the hearing date. It was the plaintiffs' case that they only learnt of the dismissal in October 2024 when they became aware of the defendants' application for eviction.



B. Defendants' response

3. The 1st respondent filed a replying affidavit sworn by NileshKumar Bhimji Harii on 16.06.2025 in opposition to the application. It was contended that the plaintiffs' application was misconceived and an abuse of the court process. It was pleaded that the plaintiffs had failed in their duty to prosecute the suit expeditiously and that the application for reinstatement had not been filed without unreasonable delay.
4. It was further stated that on 26.10.2023 the court made an order for the parties to comply with Order 11 of the Civil Procedure Rules and set down the suit for hearing and that at some point the plaintiffs' previous advocates had filed an application dated 25.10.2025 for leave to cease acting for the plaintiffs for lack of instructions which application was ultimately allowed.
5. The 1st defendant stated that when the suit was set down for hearing on 22.04.2024 the plaintiffs did not attend court but the court accommodated them by directing fresh service for hearing on 02.05.2024 when the suit was dismissed on account of their absence. The 1st defendant filed a further affidavit sworn by Victor Charo Karisa on 07.04.2025 in opposition to the application.

C. Directions on submissions

6. When the application was listed for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the plaintiffs' filed their written submissions on 28.06.2025 whereas the 1st defendants' submissions were filed on 30.06.2025.

D. Issues for determination

7. The court has considered the plaintiffs' notice of motion dated 03.05.2025, the replying affidavit and further affidavit in opposition thereto. The court is of the view that the following are the key issues which arise for determination herein;
 - a. Whether the plaintiffs have made out a case for setting aside the dismissal order and reinstatement of the suit.
 - b. Who shall bear costs of the application.

E. Analysis and determination

Whether the plaintiffs have made out a case for setting aside the dismissal order and reinstatement of the suit

8. The plaintiffs' case was that the suit was dismissed due to some sort of inadvertence or excusable mistake on the part of their previous advocates who also did not inform them for the hearing date. They cited the case of *Shah & Another vs Mbogo* [1967]EA 116 in support of their submissions. They cited the following excerpts from the said case;

“Applying the principles that the court's discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice”



9. The material on record is directly at variance with the plaintiffs' allegations in the application. There is absolutely no evidence of any form of inadvertence, accident, error or mistake on the part of the plaintiffs' previous advocates. No wonder there is no letter or affidavit from the said advocates to support the plaintiffs' allegations. The truth of the matter is that those advocates filed an application for leave to cease acting for the plaintiffs for want of instructions vide a chamber summons dated 25.10.2023. The record shows that the said application was allowed on 17.01.2024.
10. It is thus clear that the by the time the suit was listed for hearing on 22.04.2024 and 02.05.2024 the plaintiffs were deemed to be acting in person hence they could not legitimately blame their former advocates for any wrongdoing, whether deliberate or otherwise. The court is of the view that a litigant who fails to co-operate with his advocate and to give him proper instructions for the prosecution of his case can only have himself to blame in case of dismissal of the suit. As such, the plaintiffs cannot use their own default as reason to seek reinstatement of the dismissed suit.
11. The court is further of the opinion that a litigant whose suit is dismissed for whatever reason is obligated to move the court expeditiously for setting aside the dismissal order. The material on record shows that the suit herein was dismissed on 02.05.2024 but the plaintiffs did move the court until 03.05.2025, more than a year after its dismissal.
12. The court has noted in the application that the plaintiffs conceded that they became aware of the dismissal order in October 2024 when an application for their eviction was served upon him. The plaintiffs have not tendered any plausible explanation for the additional delay of about 8 months in filing the instant application. This kind of delay should disentitle the plaintiffs to the reliefs sought in the application.
13. The court notes that although the plaintiffs' suit was filed in 2018 they never took any concrete steps to prepare for trial despite directions made by the court in 2023. It is strange that the plaintiffs did not discover the dismissal order for several months. This could be an indication that the plaintiffs were not diligent in the prosecution of their case and that they never followed up with their previous advocates on the progress of their case. As such, they do not deserve the exercise of the court's discretions in their favour.

Who shall bear the costs of the application

A. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the 1st defendant shall be awarded costs of the application.

B. Conclusion and disposal orders

14. The court has found that the plaintiffs have failed to make out a case for the setting aside of the dismissal order and reinstatement of the suit. The court has also found that there was undue delay in filing the instant application. As a consequence, the plaintiffs' notice of motion dated 03.05.2025 is hereby dismissed in its entirety with costs to the 1st defendant.

It is so ordered.

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 31ST DAY OF JULY, 2025.



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Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

Mr. Kangogo for plaintiff

Ms. Essaje for the 1st defendant

No appearance for 2nd, 3rd and 4th defendants

